No. 79-5731

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

STANLEY BROWN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES

Petitioner contends that he has improperly been denied the right to appeal his convictions.

1. Following separate jury trials in the United States District Court for the District of Colorado, petitioner was convicted in October 1976 of three aggravated bank robberies, in violation of 18 U.S.C. 2113(a) and (d). Petitioner was sentenced to a term in prison not to exceed 45 years.

The subsequent proceedings followed an unusual course that has resulted in petitioner's failure to obtain appellate review of his convictions. Petitioner claims that after he was convicted his court-appointed counsel filed notices of appeal from the convictions. However, no notices of appeal appear on court records and no appeal was docketed. Petitioner contacted the court in February 1977 seeking information about the status of his appeal, but apparently there was no immediate action taken on his request. In March 1979, newly appointed counsel filed a motion under Rule 36, Fed. R. Crim. P., to correct the clerk's records so that they would reflect that a notice of appeal was timely filed from petitioner's convictions.

At the hearing on the motion, petitioner claimed that his trial counsel filed a notice of appeal with a deputy clerk of the district court, but that because of a clerical error the notice was never docketed. Petitioner introduced an affidavit from his trial counsel stating that he had executed a notice of appeal and given it to a deputy clerk, requesting that the deputy clerk file it. The affidavit also stated that the deputy clerk took the notice of appeal and agreed to file it. The affidavit of the deputy clerk, also introduced at the hearing, stated only that he recalled taking various affidavits necessary to processing petitioner's in forma pauperis appeal to the U.S. Marshal's Office for notarization. The government did not oppose petitioner's Rule 36 motion.

The trial court ruled that a notice of appeal may have been handed to the deputy clerk for filing, but that the court "lacked jurisdiction" to find that a notice of appeal had, in fact, been filed.[1/] Accordingly, on May 10, 1979, the court denied the Rule 36 motion.

On May 17, 1979, petitioner filed a notice of appeal from the original convictions but did not expressly specify that the appeal was also from the denial of the Rule 36 motion. Appellate counsel then brought the foregoing facts to the attention of the court of appeals and requested a ruling on that court's jurisdiction (Pet. App. 4). The court of appeals dismissed the appeal, holding that no timely notices of appeal were filed from the original convictions, and the May 17, 1979, notice of appeal neglected to specify that petitioner appealed from the denial of his Rule 36 motion. The court concluded that it had no jurisdiction to review either action.

1/ The court stated at the Rule 36 hearing that the court was unwilling to find that the clerk failed to file the notice of appeal (even though the clerk had "no recollection of it one way or the other") simply because it would be "very embarrassing" for the clerk (Transcript, May 8, 1979, at 23). We are lodging this transcript and other filings in the courts below with the Clerk of this Court.

2. We do not oppose the petition for a writ of certiorari. While petitioner's notice of appeal would have been more precise had it specified that it sought review of the denial of the Rule 36 motion as well as of his underlying convictions, we believe that, at least under the particular circumstances of this case, the court of appeals should have construed the notice to comprehend review of both actions. The notice was obviously intended to comprehend both, for the court of appeals could review the convictions only if it reversed the Rule 36 determination made by the district court. Petitioner followed through on this intent by promptly seeking an appellate determination of jurisdiction in the court of appeals. The court of appeals therefore erred in refusing to review the Rule 36 determination. See Foman v. Davis, 371 U.S. 178, 181-182 (1962); Scherer v. Kelly, 584 F.2d 170, 174 (7th Cir. 1978), cert. denied, 440 U.S. 964 (1979); Cobb v. Lewis, 488 F.2d 41, 44-45 (5th Cir. 1974).

On the merits, we believe that the district court erred in holding that it lacked jurisdiction to determine whether a timely notice of appeal from his original convictions was filed by petitioner's attorney. Rule 36 of the Federal Rules of Criminal Procedure, like Rule 60(a) of the Federal Rules of Civil Procedure, permits the court to correct "errors in the record arising from oversight or omission" at any time. An error resulting from the failure of a deputy clerk to record the filing of a notice of appeal on the docket constitutes the kind of error of omission or oversight that can be corrected by a court under Rule 36. 2/

2/ Cf. Schwartz v. Pattiz, 386 F.2d 300 (8th Cir. 1968) (trial court properly corrected the record under Fed. R. Civ. P. 60(a) to reflect that an amended complaint had been filed); National Equipment Rental, Ltd. v. Figurine Salon of California, Ltd., 19 F.R. Serv. 2d 1426 (E.D.N.Y. 1975) (trial court corrected record under Fed. R. Civ. P. 60(a) to reflect that an answer was timely filed).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and the case remanded to the court of appeals for a ruling on the merits of petitioner's appeal from the denial of his Rule 36 motion.

WADE H. McCREE, Jr.
Solicitor General

FEBRUARY 1980